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MARGARET MILLS ANDERSON,

Petitioner,

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, A CORPORATION,

Respondent.

No. 799

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA, *Petitioner,*

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, A CORPORATION,

Respondent.

No. 800

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA, *Petitioner,*

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT WITH SUPPORTING BRIEF AND APPENDIX.

C. GRANVILLE WYCHE,
ALFRED F. BURGESS,
Counsel for Petitioners.

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Supreme Court of The United States

October Term, 1947

No.--------

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ALFRED F. BURGESS,
Counsel for Petitioners.

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Margaret Ellis Anderson and the Coca-Cola Bottling Company of Greenville, South Carolina, respectfully represent that they are aggrieved by the final judgment and decision of the United States Circuit Court of Appeals for the Fourth Circuit in an action at law entitled Nos. 5689, 5690, and 5691, Provident Life and Accident Insurance Company, a Corporation, Appellant, vs. Margaret Ellis Anderson, Appellee, and Provident Life and Accident Insurance Company, a Corporation, Appellant, vs. Coca-Cola Bottling Company of Greenville, South Carolina, Appellee, (two cases) decided March 8, 1948, and by reason thereof your Petitioners are entitled to a Writ of Certiorari to be directed to the United States Circuit Court of Appeals for the Fourth Circuit, in order that the said judgment and decision may be reviewed by your Honorable Court.

I

SUMMARY STATEMENT OF MATTER INVOLVED

The three cases heard on appeal were commenced in the Court of Common Pleas for Greenville County and removed by the defendant to the United States District Court for the Western District of South Carolina. The first case is a suit by Margaret Ellis Anderson, plaintiff, to recover the sum of Twenty-Five Thousand ($25,000.00) Dollars from the Provident Life and Accident Insurance Company, a corporation, upon a life insurance policy issued by the defendant insurance company on the 4th day of August, 1942, on the life of her husband, Waddy M. Anderson. The case was tried by District Judge George Bell Timmerman October 18, 1946, without a jury. On February 13, 1947, Judge Timmerman filed his Opinion, Findings of Fact, and

Conclusions of Law, in favor of the plaintiff, and thereafter judgment was entered February 27, 1947. On March 10, 1947, the defendant served notice of motion for a new trial which was heard April 24, 1947. Order overruling the motion was filed June 3, 1947. The two other cases involve the identical questions.

Upon appeal by the defendant, Provident Life and Accident Insurance Company, to the Circuit Court of Appeals for the Fourth Circuit that Court, for the reasons stated in its Opinion rendered March 8, 1948, reversed the judgment of the District Court and directed that judgment be entered in each case in favor of the insurance company. It is undisputed that the insurance policy here involved is a South Carolina contract and that it is controlled by the laws and decisions of the State of South Carolina.

The Court of Appeals by appropriate orders stayed its mandate until May 12, 1948.

II

BASIS OF JURISDICTION OF SUPREME COURT

Jurisdiction rests upon Section 240-A of the Judicial Code, as amended by Act of Congress of February 13, 1925, 43 Stat. 938, (28 USCA, Sec. 347a), conferring jurisdiction to review any judgment of the Circuit Court of Appeals, and Section 5-b of Rule 38 of the Supreme Court together with diversity of citizenship and the jurisdictional amount.

III

QUESTIONS INVOLVED

Has the Circuit Court of Appeals decided an important question of local law in a way probably in conflict with applicable local decisions in that the Court did not follow the South Carolina laws as declared by the Courts of South Carolina within the requirement of Section 34 of the

Judiciary Act of 1789, 28 USCA Sec. 725 and of the decision in *Erie Rwy. Co.* v. *Tompkins,* 304 U. S. 64, and subsequent cases decided by the United States Supreme Court extending and broadening the principles laid down by the *Erie* case?

SPECIFICATION OF ERRORS

Specification No. 1

The Circuit Court of Appeals erred in refusing to affirm the judgment of the District Court that the "WAR CLAUSE" of the insurance contract was intended to and did provide exemption from liability for death of the insured when occasioned by or in aviation only if the insured was engaged, directly or indirectly, in war or some activity related to or connected with war, and that any ambiguity in the contract must, under the laws and decisions of South Carolina, be construed against the insurer.

That the contract of insurance is manifestly ambiguous is shown by the record as follows:

(a) The District Court as the trier of the facts held that the contract was ambiguous;

(b) The Insurance Company attempted to introduce evidence in the District Court upon the ground that the contract was ambiguius and sought to prove by such evidence that the ambiguous provisions were explained to the insured during his lifetime, thereby admitting in open court that the policy of insurance was susceptible to two different interpretations;

(c) Upon the motion for a new trial before the District Court counsel for the Insurance Company admitted that the contract of insurance was ambiguous as shown by the following quotation from the District Judge's order overruling motion for a new trial, to-wit:

"When this motion was heard, it was conceded by counsel for defendant that the basis for the proffered testimony is the ambiguity of the policy provisions." (Page 72 Transcript of Record).

SPECIFICATION No. 2

The Circuit Court of Appeals erred in refusing to follow the decisions of the Supreme Court of South Carolina in holding as follows:

"We do not think that the caption "WAR CLAUSE" (however inept it may be) was so ambiguous as to mislead the insured and prevent his knowing that he was not to be covered if his death occurred as a result of his operating his private plane." (Page 78 Transcript of Record).

(a) Under the rules and decisions of the Supreme Court of South Carolina it is not a question of degree of ambiguity, but whether or not the language used is susceptible of two reasonable interpretations;

(b) The rule laid down by the Supreme Court of South Carolina is that "where there exists the least doubt as to the meaning of the language employed" the Court will construe any clause of the insurance policy against the insurer.

SPECIFICATION No. 3

That the Circuit Court of Appeals erred in failing and refusing to follow the decisions of the Supreme Court of South Carolina in holding as follows:

"No real ambiguity exists when Clause three, the aviation exclusion provision, is read by itself." (Page 79 Transcript of Record).

(a) Sub-paragraph three is only a part of one long sentence contained in the rider entitled "WAR CLAUSE" and should not be read by itself but together with the en-

tire sentence and other provisions of the War Clause in order to arrive at a true intent, meaning and purpose.

(b) The Court has no right to rewrite the contract for the Insurance Company and literally lift sub-paragraph three out of the War Clause and construe it separately and apart from the remainder of the rider.

SPECIFICATION No. 4

That the Circuit Court of Appeals erred in that it failed and refused to follow the law and rules of decisions of the Courts of South Carolina which hold that in the construction of a War Clause in insurance contracts the Company must show some causal connection between the death of the insured and his service in the military, naval or air service.

(a) Under the decisions of the Supreme Court of South Carolina the death of the insured must have been occasioned by one of the hazards of war, or had some causal connection with war, in order to come within the War Clause of an insurance policy;

(b) In the case at bar the deceased was in no way connected with the "War" as defined in the War Clause, nor was he in "the military, naval, or *air forces*" as defined in the rider entitled "WAR CLAUSE".

SPECIFICATION No. 5

The Circuit Court of Appeals erred in that it failed and refused to follow the law and rules of decisions of the Supreme Court of South Carolina in holding that the Insurance Company could contest the policy after two years under the terms of the incontestable clause contained in the WAR CLAUSE, which provides that the policy shall be incontestable after it has been in force for two years "ex-

cept as to the special benefits and provisions in the War Clause attached to the policy":

(a) The incontestable clause does not contain the word aviation in its entire provisions, and the Company cannot contest its liability for death of a civilian by air travel.

(b) The words "WAR CLAUSE" as used in the incontestable clause must mean that the death of the insured should have some relation or connection with war in order to exempt the Company from liability after two years; and the undisputed facts show that the deceased was a civilian in no way connected with "War" or with the "military, naval, or air forces" as defined in the policy.

SPECIFICATION No. 6

That the Court of Appeals erred in refusing to follow the laws and decisions of the Supreme Court of South Carolina which hold that in an action by the beneficiary of an ambiguous insurance contract, evidence as to conversations between the insured and the agent of the company and between the insured and others during which the company claims the deceased admitted that he was not insured while flying, is incompetent and inadmissible. (Page 81 Transcript of Record).

IV

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The insurance policy upon which petitioner brought suit is a South Carolina contract and the case is governed by the laws of the State of South Carolina. The judgment and decision of the Circuit Court of Appeals is in direct conflict with the law and rules of decision of the State of South Carolina and with the undisputed facts as shown by the record, and unless reversed the decision and judgment

of the Circuit Court of Appeals for the Fourth Circuit will be a refuge and escape to the Insurance Company from its contract and liability under the laws and decisions of the State of South Carolina, and under the decisions of the Supreme Court of the United States. That the Insurance Company was able to move the original case against it from the State to the Federal Courts is due solely to the circumstance of diversity of citizenship and jurisdictional amount.

Wherefore your petitioners pray that this Honorable Court do issue its writ of Certiorari directed to the Circuit Court of Appeals for the Fourth Circuit, in order that its decision and judgment may be reviewed by the Supreme Court of the United States.

Respectfully submitted,

MARGARET ELLIS ANDERSON,
Petitioner,

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA,
Petitioner

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA,
Petitioner

BY C. GRANVILLE WYCHE,
ALFRED F. BURGESS,
GREENVILLE, SOUTH CAROLINA,
Counsel for Petitioners.

SUPPORTING BRIEF

I

Index to brief is included in index to petition, *supra.*

II

Findings of Fact and Conclusions of Law of District Court in C. A. No. 643, (Page 5 Transcript of Record).

Findings of Fact and Conclusions of Law of District Court in C. A. No. 644, (Page 12 Transcript of Record).

Findings of Fact and Conclusions of Law of District Court in C. A. No. 645, (Page 19 Transcript of Record).

Opinion of District Court in all three cases, (Page 27 Transcript of Record).

Opinion of the United States Circuit Court of Appeals, (Page 75 Transcript of Record).

III

GROUNDS ON WHICH SUPREME COURT JURISDICTION IS INVOKED

This application is made upon authority of Section 240-a of the Judicial Code, as amended by the Act of Congress of February 13, 1925, 43 Stat. 938 (28 USCA, Sec. 347a), and Section 5-b of Rule 38 of the Supreme Court, together with diversity of citizenship and jurisdictional amount.

IV

STATEMENT OF CASE

The three cases heard on appeal were commenced in the Court of Common Pleas for Greenville County and removed by the defendant to the United States District Court for the Western District of South Carolina. The first case is a suit by Margaret Ellis Anderson, plaintiff, to recover the

sum of Twenty-five Thousand ($25,000.00) Dollars from the Provident Life and Accident Insurance Company, a corporation, upon a life insurance policy issued by the defendant insurance company on the 4th day of August, 1942, on the life of her husband, Waddy M. Anderson. The case was tried by District Judge George Bell Timmerman on October 18, 1946, without a jury. On February 13, 1947, Judge Timmerman filed his Opinion, Findings of Fact, and Conclusions of Law, in favor of the plaintiff, and thereafter judgment was entered February 27, 1947. On March 10, 1947, the defendant served notice of motion for a new trial which was heard April 24, 1947. Order overruling the motion was filed June 3, 1947. The other two cases involved the identical question.

On the 4th day of August, 1942, the Provident Life and Accident Insurance Company, in consideration of an annual premium of One Thousand One Hundred Ninety-one and 50/100 ($1,191.50) Dollars, executed and delivered to Waddy M. Anderson a life insurance policy in the sum of Twenty-five Thousand ($25,000.00) Dollars in which his wife, Margaret Ellis Anderson, is named as beneficiary. This policy was executed and delivered to Waddy M. Anderson in the State of South Carolina.

Waddy M. Anderson, the insured, at the time of the execution and delivery of the policy and at the time of his death, was a resident and citizen of Greenville, South Carolina, and was General Manager of the Coca-Cola Bottling Company of Greenville, South Carolina. He held a private pilot's license issued to him on May 9, 1945, (more than two years after the policies were issued to him), and was the owner of his own private airplane. On the morning of October 8, 1945, the insured, flying his own airplane, took off from Greenville, South Carolina, Municipal Airport and flew to Spartanburg, South Carolina. After spending some time in Spartanburg, he returned to Greenville. Upon land-

ing at Greenville, the airplane went into an unintentional left turn and he received certain internal injuries. Two other passengers aboard were not seriously hurt. Mr. Anderson was taken to the hospital where, after an operation, he died on October 17, 1945. Mr. Anderson, the insured, at the time of his injuries, was not in the army, navy, air, marine, medical service or any auxiliary, supplementary or related branch or division of any such service, whether combative or non-combative in nature, nor was he in any way engaged in any activity connected with the war. The airplane trip to Spartanburg and return had no connection or relation whatever with any phase of service in the military, naval, or air force, directly or indirectly, nor with any phase of the war.

The insurance policy is an ordinary 20-payment life insurance contract. The first page sets forth an agreement to pay the beneficiary upon due proof of the death the sum of Twenty-five Thousand ($25,000.00) Dollars. On the following four pages there are many general provisions such as are usually contained in insurance policies. Under the subhead, "CONTRACT," the policy contains, among other things, the following paragraph:

> "If the Insured, within two years from the date of this policy, shall die by his or her own hand or act, whether sane or insane, the amount of insurance payable shall be limited to the premiums paid in cash for this contract."

There is no provision in the principal contract exempting the insurance company from liability for death resulting from operation or riding in an airplane or from service in the military, naval or air forces. The only limitation is that if the insured, within two years from the date of the policy, shall die by his own hand or act, whether sane or insane, the amount of insurance payable shall be limited to the premium paid in cash for the contract.

This was the form of the policy issued prior to the entry of the United States into World War II. After America entered the war, the insurance company attached a rider to the contracts issued to protect itself from the extra hazards of war. This rider, which was printed on a separate sheet, was attached to the policy, and reads as follows:

"WAR CLAUSE

"This agreement is attached to and made a part of policy No. 92850 on the life of

WADDY M. ANDERSON

"This policy is issued subject to the following conditions and limitations which shall apply notwithstanding any conflicting provision of the policy.

"If the death of the Insured shall occur:

"1. While serving outside the continental limits of the United States in the military, naval or air forces of any country engaged in war regardless of the cause of death, or anywhere within six months following termination of such service, if death is a direct or indirect result of injuries incurred or sickness or disease contracted while in such service; or

"2. While serving within the continental limits of the United States in an air force of any country engaged in war regardless of the cause of death, or within six months following termination of such service, if death is a direct or indirect result of injuries incurred or sickness or disease contracted while in such service; or

"3. As a result of operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regularly scheduled flight between definitely established airports within the continental limits of the United States; or

"4. Within two years after the date of issue of this policy as a result of injuries incurred or sick-

ness or disease contracted while traveling or residing as a civilian outside the continental limits of the United States and as a result of war or any act of war.

"Then, provided this policy is in force, the amount payable shall be the total amount of the premiums paid without interest or the life insurance reserve, whichever is greater, but in no event more than the sum insured. Any indebtedness to the Company under this policy shall be deducted from the amount otherwise due.

"War" includes any conflict between the armed forces of countries, whether war is declared or undeclared. "While serving" includes the entire period from enrollment to discharge whether service be active or inactive. "The military, naval or air forces" include the army, navy, air, marine, medical service and any auxiliary, supplementary or related branch or division of any such service, whether combative or non-combative in nature. "The continental limits of the United States" do not include the Panama Canal Zone.

"The part of the policy entitled 'When policy is incontestable' is hereby eliminated and the following substituted:

"This policy shall be incontestable after it has been in force, during the lifetime of the Insured, for two years from its date of issue, except for nonpayment of premium and except as to the special benefits and provisions in the War Clause attached to this policy and except as to benefits for total and permanent disability and additional insurance against death by accident if such benefits are included in this policy."

"In witness whereof the Provident Life and Accident Insurance Company has caused this agreement to be executed this 4th day of August, 1942."

The District Court held that the Clause in question was intended to be just what the Company called it—a "War Clause", and that it clearly appears that the Com-

pany intended, in its principal contract, to assume the risk of death by air travel. It further held that the Company had the selection of words to express its meaning, and the clear implication, considering all the provisions of the policy together, is that the Company was willing to assume the risk of peacetime aviation, but was unwilling to assume the risk of death in aviation if it was a part of or connected with the war effort, and that the Company so construed its policy when it denominated the very provision under consideration a "WAR CLAUSE"; and that if the contract is ambiguous, such ambiguity under the laws of South Carolina must be construed in favor of the insured and against the insurer.

The Circuit Court of Appeals reversed the District Court and held that sub-paragraph three of the rider entitled "War Clause" included civilians who were not in the military, naval, or air forces nor in any way connected with the war as defined in the War Clause, and that "no real ambiguity exists when Clause three, the aviation exclusion provision, is read by itself."

V

ARGUMENT

Specification of Error No. 1

Under the doctrine of the *Erie Rwy. Co. v. Tompkins, Supra* 304 U. S. 64, the law to be applied in this case is the law of the State of South Carolina and it is not a matter of Federal concern whether the law of the State shall be declared by its Legislature in a statute or by its highest Court in a judicial decision. The law established by judicial decisions of State Courts, as well as those described by statute, constitute laws which, by Section 34 of the Judiciary Act of 1789,

I Statutes at Large 92, Chap. 20; 28 USCA, Section 725, are made the rules of decision in trials at common law.

The petitioners claim that the Circuit Court of Appeals erred in refusing to affirm the judgment of the District Court that the "WAR CLAUSE" of the insurance contract was intended to and did provide exemption from liability for death of the insured when occasioned by or in aviation only if the insured was engaged, directly or indirectly, in war or some activity related to or connected with war, and that any ambiguity in the contract must, under the laws and decisions of South Carolina, be costrued against the insurer. The policy, as pointed out by the District Court, is divided into three separate parts: (1) The main insurance contract; (2) The total and permanent disability contract; and (3) The War Clause Agreement.

The principal contract is a straight life insurance policy with but one limitation, and that is self-destruction within two years after the issuance of the policy. There is no provision in the principal contract excluding or limiting liability if death results from air travel or any other kind of transportation. If the insurance company in good faith had actually intended to exempt itself generally from liability where death resulted from operating or riding in an airplane, it would have placed such a clause in the usual and customary place among the provisions of the main insurance contract just as it did when it exempted itself from liability during the first two years if death should be caused by self-destruction. There is no mention of air travel in the principal contract. If sub-paragraph three of the WAR CLAUSE concerning air travel was to have no connection with the military, naval, and air forces, or war, what would be the purpose of placing this sub-paragraph within the confines of the rider which is concerned with war?

The absence of any air travel clause in the general insurance contract is emphasized by the fact that there is such

a provision in the second part of the contract entitled "Total and Permanent Disability Benefits." "Among the risks not assumed" for total and permanent disability, the second part of the contract provides that no benefit shall be granted for disability resulting directly or indirectly from air travel except travel as a fare-paying passenger. It thus appears that the Insurance Company consciously and intentionally omitted any exclusion or limitation of liability for air travel in the principal insurance contract for death. One must be impressed by the fact that the air travel exclusion clause is in the total and permanent disability rider and not in the principal contract. It thus appears that the insurance company intended to insure the deceased against death by air travel or any other kind of travel in the principal contract.

Prior to the war, the Insurance Company issued and sold to the public this same insurance contract without the rider entitled "WAR CLAUSE" and that its only limitation was that of suicide within two years from the date of the policy. Its premium prior to the war was based upon the assumption of liability for all kinds of transportation, whether by air or otherwise. After the Congress of the United States declared war upon Japan and entered World War II, this Company attached to its regular policies a WAR CLAUSE to protect itself from the extra hazards of war. There is not the slightest doubt that the rider entitled "WAR CLAUSE" which is attached to this policy was conceived and written after the entry of the United States into the war and was intended to limit the liability of the Insurance Company on account of the extra hazards of war.

The District Court, in its Findings of Fact and Conclusions of Law, held:

> "That the 'WAR CLAUSE' of the policy was intended to and did provide exemption from liability for the death of the insured occasioned by or

> in aviation only if the insured was engaged directly or indirectly in the war or some action related to or connected with war."

The District Court in its Opinion held that if the contract was ambiguous and susceptible to any other meaning it must be construed in favor of the insured and against the Insurance Company under the decisions of the United States Supreme Court and of the Supreme Court of South Carolina. The contention that the contract is ambiguous was first made by the Insurance Company.

Is the contract ambiguous? The facts in the record stand out like a sore thumb:

(1) At the trial in the District Court, counsel for the Insurance Company attempted to introduce evidence that the ambiguity of the contract was explained to the insured during his lifetime. The Company was so impressed with the ambiguity of its own contract that it insisted that the Court admit evidence in an effort to prove that its meaning was explained to the insured after he purchased the policy. The petitioners from the beginning contended that if the WAR CLAUSE is construed according to its true intent, meaning, and purpose, the rider must be construed to be a provision to save the company from the extra hazards of war, and the Insurance Company is liable to the beneficiaries, and that any ambiguity in its language must be construed in favor of the beneficiaries.

(2) Upon motion for a new trial before the District Court, counsel for the Insurance Company conceded that the contract of insurance is ambiguous. In arguing the motion, the record shows the following questions by the Court and answers by Mr. Chambliss, General Counsel for the Insurance Company: (Page 62, Transcript of Record).

> *The Court:* That is just what I am thinking about. I want to say this. I walked in here a few minutes ago and just sat down and made two or

three notes indicative of my way of thinking. I want to see if you agree with me along this line. I wrote these notes: 'If the testimony is to be allowed of proof of an alleged conversation between the deceased and Insured and an agent of the insurer, concerning the application for issuance of the policy, and if conversations about the policy and its issuance should be allowed, would it not be on the theory that the policy is ambiguous?'

"*Mr. Chambliss:* Yes, sir.

"*The Court:* The next question I have in my mind is this: If the policy is ambiguous, whose fault is it? Is it not the fault of the insurer?

"*Mr. Chambliss:* Your Honor pointed that out in your opinion, and I am frank to say to you that I think on the surface it is the fault of the insurer; that the insurer, having the superior knowledge, as suggested in your opinion, ought to have known better than to use such language.

"*The Court:* Here is my further thought on it. Now, if the policy is ambiguous and if the insurer is responsible for the ambiguity, should the insurer be allowed to escape the consequences of its own act by repeating conversations between its agent and the deceased insured, when it is impossible for the insured to speak in explaining or denial of the conversation?

"*Mr. Chambliss:* I think those pose very clearly what I might call the underlying justice questions in the case."

(3) In the District Judge's Order overruling the motion for a new trial, the District Judge holds the following to be a fact:

> "When this motion was heard it was conceded by counsel for the defendant that the basis for the proffered testimony is the ambiguity of the policy provisions."

In the face of this record, can the Circuit Court of Appeals simply say *ipse dixit* and legally conclude that the insurance contract is not ambiguous?

No State has been more liberal than South Carolina in construing insurance contracts which are ambiguous in favor of the insured. In the recent case of *Walker v. Commercial Casualty Insurance Co.*, 191 S. C. 187; 4 S. E. 2nd 248 (1939) the Supreme Court of South Carolina set forth the rule which should guide the Courts in construing insurance contracts. We quote the following from that decision:

> "Where the language of such a contract may be understood in more senses than one or where it is doubtful whether given words were used in an enlarged or a restricted sense, other things being equal, that construction should be adopted which is most beneficial to the insured. *Prosser v. Carolina Mutual Benefit Corp.*, 179 S. C. 138; 183 S. E. 710, 712.
>
> "Printed insurance contracts prepared by experts in any respect ambiguous or capable of two meanings must be construed in favor of the assured. *Jennings v. Clover Leaf Life & Casualty Co.*, 146 S. C. 41; 143 S. E. 668, 670.
>
> "In the construction of insurance contracts, ***in cases of doubt, uncertainty, manifest ambiguity, or susceptibility of two equally reasonable interpretations, since the language used is the selection and arrangement of the insurer, such contracts must be liberally construed in favor of the insured. *Parker v. Jefferson Standard Life Ins. Co.*, 158 S. C. 394; 155 S. E. 617, 618."

The District Court in addition to the South Carolina case also cited and relied upon the recent case decided by the United States Supreme Court, *Aschenbrennen v. United States Fidelity & Guaranty Co.*, 292 U. S. 80; 78 L.Ed. 1137, and quoted the following from that decision to sustain its findings:

> "****it is unnecessary here to follow the niceties of legal reasoning and terminology applied in negligence suits against common carriers, for we are interpreting a contract and are concerned only

with the sense in which its words were used. *Farber v. Mutual Life Ins. Co. of New York*, 250 Mass. 250, 254; 145 N. E. 535; 36 A.L.R. 806; *Boyd v. Royal Indemnity Co.*, 120 Ohio St. 515, 517, 166 N. E. 580. The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policyholder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted. *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, 322; 48 S. Ct. 512; 72 L.Ed. 895; *Mutual Life Insurance Co. v. Hurni Packing Co.*, 263 U. S. 167, 174; 44 S. Ct. 90; 68 L.Ed. 235; 31 A.L.R. 102; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

In the light of these decisions let us examine the "WAR CLAUSE" agreement. In no instance does the "WAR CLAUSE" here being construed attempt to include a civilian except in sub-paragraph four wherein it is provided that the Company shall not be liable if death results from injuries incurred or sickness or disease contracted while traveling or residing outside the continental limits of the United States and as a result of the war or any act of war. That paragraph of the WAR CLAUSE reads as follows:

> "within two years after the date of issue of this policy as a result of injuries incurred or sickness or disease contracted while traveling or residing as a civilian outside the continental limits of the United States and as a result of war or any act of war."

Thus it will be seen that when the "WAR CLAUSE" is really intended to apply to a person outside of the armed forces as defined in the policy and to include a civilian, the clause specifically mentions the fact that it does include a

civilian and, even then, the death of the civilian must be the result of war or some act of war. If the air travel clause were meant to apply to a civilian, it certainly would have so stated as was done in sub-paragraph four.

The definitions which are given in the latter part of the WAR CLAUSE emphasize and make clear the fact that this special agreement relates only to persons in the military, naval and air forces as defined in the agreement, and that it does not relate to civilians or to persons who have no connection with the war. The definitions given all relate to service in the army, navy and air corps and not one word is said about a civilian being included under the terms of this WAR CLAUSE. The following paragraph taken from the WAR CLAUSE agreement gives the definitions as outlined by the Insurance Company:

> " 'War' includes any conflict between the armed forces of countries, whether war is declared or undeclared. 'While serving' includes the entire period from enrollment to discharge whether service be active or inactive. 'The military, naval or air forces' include the army, navy, marine, medical services and any auxiliary, supplementary or related branch or division of any such service, whether combative or non-combative in nature. 'The continental limits of the United States' do not include the Panama Canal Zone."

The word "war" is given a broad definition so as to include all conflict between armed forces of countries whether war is declared or undeclared. If we should take the word "war" as defined in the WAR CLAUSE and substitute the definition given by the insurance company of "war", we would have a clause which includes conflict between armed forces, whether declared or undeclared. That means that this WAR CLAUSE includes and covers all phases of the war but it does not include things which are unconnected or unrelated to war. The paragraph

goes further and defines the words "while serving" as meaning substantially the time from the date of enlistment until the person is discharged from the armed forces and "the military, naval and air forces" are meant to include every phase of service in the armed forces, combative and non-combative, alike. Not a single reference is made to or hint given that the WAR CLAUSE is intended to bring within its terms civilians engaged in no way in warfare in any of its phases. The fact that there is a separate paragraph giving specific definitions of the word "war", "while serving" and "the military, naval or air forces", points unerringly to the conclusion that the WAR CLAUSE was intended to refer only to persons while serving in the military, naval or air forces, or to some related branch of the service during the war. If the paragraph relating to air travel were intended to cover civilians, its purpose has been most astutely camouflaged with war and military phrases.

If it be conceded that the rubber stamp "War and Aviation Clause" be transferred and placed upon the sheet entitled "WAR CLAUSE", that stamp would not change the real intent, purpose and meaning of the WAR CLAUSE when it is read altogether as it is written. The evident purpose of this clause was to save the insurance company from the extra hazards of the thousands of men in the service who had to travel by airplane in connection with their duties in the armed forces, although in no way connected with the air force. If the clause had meant to refer to civilians, it would not have followed the two preceding clauses using the words "while serving" and would not have been separated merely by a semicolon. There can be no doubt that the lawyer who wrote that WAR CLAUSE had in mind persons engaged in the military, naval and air force or in some way connected with some branch of such service. Therefore, even though the insur-

ance company should be permitted to amend the contract by striking out the title "WAR CLAUSE" and substituting therefor the clause "War and Aviation Clause" and, also, striking out the words "WAR CLAUSE" in the incontestable clause and substitute the rubber stamp, yet the true intent and purpose of sub-paragraph 3 was to save the company from the extra hazards of air flight in the armed services where the men were in no way connected with the air force. Even with the rubber stamp substituted, it would take a great stretch of the imagination to conclude that the author of this WAR CLAUSE had in mind a general air travel exclusion clause as could have been easily written, if such had been the intention of the insurance company.

Subhead 3 in the WAR CLAUSE is a part of the WAR CLAUSE, and it was not intended to be a part, or to limit any other insuring provision of the contract. If that were true, and if it were the intention of the insurance company that Item three in the WAR CLAUSE was intended to limit all the other insuring provisions of the policy, then it would not have been necessary to insert, and the insurance company would not have inserted, in the disability insuring provisions, a similar aviation clause. The fact that a similar aviation clause was inserted in a disability insuring provisions shows conclusively that sub-paragraph 3 in the WAR CLAUSE was to relate only to the WAR CLAUSE, and that it was to be construed together and in connection with the other subhead provisions 1, 2 and 4 of the WAR CLAUSE. Subhead 3 in the WAR CLAUSE is not a complete sentence. It is only part of a sentence, set apart by a semicolon and must be read in connection with the preceding subheads which clearly indicate that the sentence as a whole has reference to the war and those serving in military, naval and air forces.

SPECIFICATION OF ERROR No. 2

The Second Specification of Error charges that the following holding by the Circuit Court of Appeals is directly in conflict with the decisions of the Supreme Court of South Carolina:

> "We do not think that the caption "WAR CLAUSE" (however inept it may be) was so ambiguous as to mislead the insured and prevent his knowing if he was not to be covered if his death occurred as a result of his operating his private plane." (Page 78 Transcript of Record).

Under the rules and decisions of the Supreme Court of South Carolina it is not a question of degree of ambiguity but whether or not the language used is susceptible to two reasonable interpretations. It is not a question of whether or not it would appear ambiguous to one skilled in legal reasoning and technicality but how it would appear to one without technical training. The rule laid down by the Supreme Court of South Carolina is that where there exists the least doubt as to the meaning of the language employed, the court will construe any clause of an insurance policy against the insurer. In the case of *Bolt v. Life & Casualty Insurance Co.*, 156 S. C. 117; 152 S. E. 766, the Supreme Court of South Carolina through Mr. Justice Blease lays down the following guide for the construction and interpretation of insurance contracts:

> "In *Rawl v. Insurance Co.*, 94 S. C. 299; 77 S. E. 1013, 1014, 44 L.R.A. (N.S.) 463, Ann. Cas., 1915-A, 1231, Mr. Justice Woods referring to the construction of an insurance policy cited several of our cases to sustain this proposition:
>
> " 'If the meaning is doubtful, or the language is calculated to mislead, the Court will adopt the meaning most favorable to the maintaining of the liability'.

"This Court has also decided, 'where insurer writes a policy of life insurance, it should be read most strongly against it.' (Syllabus) *McKendree v. Life Insurance Co.*, 112 S. C. 335; 99 S. E. 806.

"***An examination of many of our decisions, too numerous to even refer to here, will disclose that our Court has made it the almost universal rule to construe any clause of an insurance policy against the insurer, when there existed the least doubt as to the meaning of the language employed. The two South Carolina cases, above referred to, are indications of the holdings of this Court."

In the case of *Haselden v. Standard Mutual Life Ass'n.* 190 S. C. Page 1; 1 S. E. (2d) 924, the Supreme Court of South Carolina says:

"It is a cardinal principle of insurance law in this State, requiring no citation of authority, that a policy or contract of insurance is to be considered liberally in favor of the insured, and strictly as against the company. Stated more fully, the rule is, that where by reason of ambiguity in the language employed in a contract of insurance, there is doubt or uncertainty as to its meaning, and it is fairly susceptible of two interpretations, one favorable to the insured and the other favorable to the company, the former will be adopted."

SPECIFICATION OF ERROR No. 3

Specification of Error No. 3 charges that the Circuit Court of Appeals erred in holding that when sub-paragraph three of the WAR CLAUSE is read by itself separately and apart from the rest of the WAR CLAUSE, no real ambiguity exists. Sub-paragraph three of the WAR CLAUSE is only a part of a long involved sentence contained in the rider entitled "WAR CLAUSE", and should not be read by itself but together with the entire contract in order to arrive at a true construction as to its real intent and purpose. Under the decisions of the Supreme Court of

South Carolina the contract must be construed as a whole. The Court of Appeals has no right to re-write the contract for the Insurance Company and literally lift sub-paragraph three out of the WAR CLAUSE and construe it alone in order to make it of general application to civilians and persons engaged in the war effort alike.

In order to make the paragraph relative to air travel applicable to civilians, the insurance company is asking the Court to literally lift out paragraph three of the War Clause and disassociate it from all connection with its real purpose which is without question to relieve the Insurance Company from liability occasioned by the extra hazards of war. If the court were inclined to follow this line of reasoning and to construe the WAR CLAUSE separately and apart from the air travel paragraph, it would present a most unusual situation. For example, if the insured under this same contract should have lost his life while operating or riding in an airplane as a civilian after the official termination of the war and after the real purpose of the WAR CLAUSE had passed, the court would be called upon to hold that the insurance company was not liable under the terms of what it has designated as a WAR CLAUSE when there was no war. Surely, the insurance company could not escape liability under the terms of a WAR CLAUSE when there was no war in existence and the insured was not in any branch of the armed forces. The Court would not be justified in holding that sub-paragraph three of the WAR CLAUSE could stand alone in time of peace. It would hardly make sense under the heading "WAR CLAUSE".

Specification of Error No. 4

Specification of Error No. 4 charges that the Circuit Court of Appeals erred in refusing to follow the decisions of the Supreme Court of South Carolina in its interpreta-

tion of the War Clause in the insurance contract. The term "WAR CLAUSE" as used in insurance contracts has a well defined and established meaning. The phrase is used by insurance companies and by the Courts, both State and Federal, to mean that part of an insurance contract which excludes or limits liability of the insurance company in case the insured dies while serving in the miltary, naval, or air forces of his Country. In the interpretation of these War Clauses the decisions of the Courts may reasonably be said to fall into two general lines, to-wit: "causal relation" cases and "status cases". The majority of the courts favor the "causal relation" decisions. These decisions are generally to the effect that the exemption of the insurance company from liability arises only where a "causal relation" is shown to exist between the military, naval, or air service, and the death of the insured. In the other line of cases the decisions hold that the exemption of the insurance company from liability arises from the mere "status" of one in the military, naval or air service at the time of his death. These decisions hold that the exemption does not depend upon any "causal relation" between the death and service in the armed forces. The Supreme Court of South Carolina has unquestionably adopted the "causal relation" doctrine and repudiated the "status" theory. The rider attached to the insurance policy is a WAR CLAUSE and should be so construed in accordance with and in the spirit of the recent decision of *Young v. Life and Casualty Insurance Company*, 204 S. C. 386; 29 S. E. 2d 482. We quote the following from that decision:

> "There is no question but that when the insured became enrolled and took the prescribed oath, he entered the military service of the United States Government, and thereafter became subject to the orders and discipline provided for that branch of the service. The sole issue here is wheth-

er the parties intended status or causation to govern liability.

"The Supreme Court of Oklahoma, in a soundly reasoned case (*Barnett v. Merchants' Life Ins. Co.*, 87 Okl. 42; 208 P., 271, 273), had this to say with reference to a military clause in which the word 'engage' was used:

" 'But, under the admitted facts in this case, we prefer to follow the other rule (causation and not status) supported by well-reasoned cases hereafter mentioned. There can be no serious contention but that the intention of the parties to the contract of insurance by inserting a military clause was to restrict and limit the liability of the company in the event of increased hazard to the insured by engaging in military service. Now, if such service did not increase the hazard, the clause has served its purpose.***

" 'The phrase "engaged in military service in time of war", in order to have a consistent and harmonious construction in connection with the general terms and scope of the insurance contract, must denote such service as would increase the hazard or risk of the insurer. Where the insured died many miles away from actual military engagements, with an ordinary disease, common alike to civil and military life, there is no just reason to permit the insurer from escaping liability such as was assumed by it under its primary obligation as shown by the stipulation herein.'

"In *Illinois Bankers' Life Ass'n. v. Daveney*, 1924, 102 Okl., 302, 226 P., 101, 103, the policy involved contained the following clause: 'It is expressly provided that death while in the service in the army or navy of any government in time of war is not a risk covered at any time during the continuance or reinstatement of this policy of any greater sum than the amounts actually paid to the company herein.' It was contended that since the clause in question did not include the term 'engage', the case was distinguished from *Barnett v. Merchants' Life Ins. Co.*, 1922, *Supra*. But the

Court overruled this contention, expressing the opinion that under the type of *war clause* (italics ours) here involved, it was just as necessary to show that the insured's death resulted from his participation in military service as it was under the type of clause construed in the *Barnett* case. It was accordingly held that since it appeared that the insured had died of pneumonia while in the service, a disease which was common to people in both civil and military life, the insurer was liable for the full face amount of the policy.

"In the case before us, we think it clear that although the policy contains the word 'enroll' and not 'engage', it was intended by the parties, insured and insurer, that the failure of the insured to obtain the permit and pay the extra premium would reduce the company's liability only in case his death should result from a risk peculiar to the military service.

"In the recent case of *Smith v. Sovereign Camp of The Woodmen of the World,* 204 S. C., 193; 28 S. E. (2d), 808, 810, the military clause of the policy there under consideration provided: 'The double indemnity benefits hereby provided shall not be payable—while the member is in the military or naval service in time of war.' we have the same phraseology in the policy now before us; and in that case, as in this, the insured died as the result of an automobile accident while on furlough. The Court held that under the foregoing provision, there must be some causal connection between the accident and the military service; and that the death of the insured while on furlough was not a risk of military service within the meaning of the policy provision."

Surely a War Clause in all of its aspects must have some relationship to service in the military, naval and air forces, and the hazards of war. A provision which has no relationship to such service in the military, naval or air forces, or with conflict of armed forces, certainly has no

place within the confines of a War Clause. A WAR CLAUSE can mean nothing under the decisions of the Supreme Court of South Carolina if it does not mean a clause exempting the company from liability occasioned by the extra hazards of war or, at least, service in some phase of the armed conflict as defined in the rider itself.

Specification of Error No. 5

Specification of Error No. 5 charges that the Circuit Court of Appeals erred in that it failed and refused to follow the law and rules of decisions of the Supreme Court of South Carolina in holding that the Insurance Company could contest the policy after two years under the terms of the incontestable clause contained in the WAR CLAUSE, which provides that the policy shall be incontestable after it has been in force for two years except as to special benefits and provisions in the WAR CLAUSE attached to the policy. The incontestable clause does not contain the word "aviation" in its entire provisions. The Circuit Court of Appeals has held substantially that "no real ambiguity exists when Clause 3, the aviation exclusion provision, is read by itself". The Appellate Court holds that the insurance company should be allowed to extract sub-paragraph 3 from the WAR CLAUSE and construe it as being a separate and distinct aviation clause of general application in no way connected with the war or with the armed services. If so construed is can not come within the definition of WAR CLAUSE. And following the same line of reasoning adopted by the Circuit Court of Appeals the remaining part of the rider, which is concerned with war, must be the WAR CLAUSE referred to in the incontestable clause. The Supreme Court of South Carolina has definitely held that where there is any doubt as to the meaning of the terms contained in an incontestable clause that the doubt should

be resolved in favor of the insured. In the case of *McKendree v. Southern Life Ins. Co.*, 112 S. C. 335; 99 S. E. 806, the Supreme Court of South Carolina in considering whether or not the Insurance Company should be allowed to contest a policy under an incontestable clause makes the following observations:

> "Thereabout the following reflections are pertinent. The insurer writes the policy, and it should be read most strongly against the writer; policies are usually periphrastic and sometimes ambiguous; the insured must take that tendered or none; propaganda has constituted life insurance to be almost one of the necessities of life; neither the insured nor the selling agent of the insurer are, as a rule, experts in the use of or in the interpretation of language; the ordinary man who buys a policy would judge the clause in issue to mean that which the plain words of it imply, and especially is that true when those words, in the instant case, are printed in bold type; the insurer has unmeasured time before a contract is made to investigate the facts, and to that end the insured is called in the answers to the application to testify against himself; there is no reason why the truth may not be ascertained before as well as after the contract is made; clauses like the instant one are calculated to lure men into taking insurance who would not otherwise do so; differences about the health of the insured affect the very prerequisites of the contract, and are really the only facts to be settled before the contract is made; fraud resides in the intent of a party, and the inquiry about it ought not to be deferred until such time as he who had the intent is dead, and he who reasonably understood that such an inquiry could only be made in his lifetime; the insurer, by practice and experience, always and for its protection anticipates deception by the insured, and sets to work by exhaustive and *ex parte* methods to discover it; at the close of the inquiry the insurer has stipulated that there

shall be no further contest about that matter, and the insured has gone to his death in that belief."

The Court will observe that the words WAR CLAUSE in the incontestable clause are written with a capital "w" and a capital "c" to emphasize the term "war clause" and what the Supreme Court of South Carolina says about the words being printed in bold type is applicable to the case at bar.

We must bear in mind that the incontestable clause and the WAR CLAUSE were drawn by experts in the use of the language of insurance policies. There is no reference whatsoever in the incontestable clause to air travel. As heretofore pointed out, the words "WAR CLAUSE" have a well-known and well-understood meaning and specifically refer to that portion of an insurance contract which eliminates or limits liability for death while in the military, naval or air forces of the armed services. If the Court should hold that the insurance company intended to have a WAR CLAUSE and a general AVIATION CLAUSE and that the rubber stamp is sufficient to indicate such intention, then there is nothing in the record to show that the words "WAR CLAUSE" in the incontestable clause also meant AVIATION CLAUSE. The Court cannot rewrite the contract for the benefit of the insurance company. If the insurance company intended for the incontestable clause to concern itself with aviation, it should have been so written. There is not one word in the incontestable clause referring to aviation.

In construing an incontestable clause the United States Supreme Court in the case of *Mutual Life Insurance Company v. Hurni Packing Company*, 263 U. S. 167, uses this language:

> "The rule is settled that in case of ambiguity that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company and it is

consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it.***

"***It was within the power of the insurance company if it meant otherwise to say so in plain terms. Not having done so, it must accept the consequences resulting from the fact that the doubt for which its own lack of clearance was responsible must be resolved against it.***

"***The argument is ingenious but falacious since it ignores the fundamental purpose of all simple life insurance which is not to enrich the insurer but secure the beneficiary who has a real, or be it sometimes, only a contingent interest in the policy".***

SPECIFICATION OF ERROR NO. 6

During the trial in the District Court, the insurance company sought to introduce evidence that the insured had made statements during his lifetime to the effect that he was not insured under the terms of these contracts while he was flying his own plane as a civilian. The company contended that this evidence was admissible to prove that the ambiguous provisions of the contract were explained and understood by the insured. The Circuit Court of Appeals refused to pass upon the question of whether or not the evidence tendered by the insurance company was admissible or inadmissible. It held it was unnecessary to pass upon this question. There are two decided cases by the Supreme Court of South Carolina directly in point which hold that such testimony is inadmissible, and none to the contrary.

In the case of *Dial v. Life Association,* 29 S. C. 560; 8 S. E. 26, the insurance company sought to prove that George L. Dial, the insured, made a statement in regard to having received notice of an assessment by the company and a further statement in regard to his attempt to be reinstated. The company further offered testimony as to acts of the insured showing knowledge of the forfeiture of his

policy and attempt to be reinstated. The Supreme Court of South Carolina held that in an action by his wife, the beneficiary, the company would not be permitted to prove any statements made by the insured.

We quote the following from that case:

> "Exceptions 5 to 9 inclusive, in so far as they relate to the declarations of George L. Dial, may be considered together. These declarations were clearly incompetent. Neither he nor any representative of his was a party to the action. Besides, the authorities show that his declarations, in a case like this, are incompetent. See *Bliss on Life Insurance*, section 383, and the other authorities cited by counsel for respondent."

To the same effect is the case of *Thompson v. Insurance Company*, 63 S. C. 290; 41 S. E. 464. At page 292 of the case, Mr. Justice Gary, speaking for the Court, says:

> "The second exception is as follows: 'II. Because his Honor erred in refusing to admit in evidence the affidavit of W. W. Thompson made May the 8th, 1898, in suit of *Jesse M. Thompson v. C. P. & A. E. Brown*, in which deponent said, "that deponent has been for a year and is now in frail health forbidding most of the time attention to business." The case of *Dial v. Life Association*, 29 S. C. 560, shows that this exception cannot be sustained.'"

The Supreme Court of North Carolina follows the same rule as South Carolina in the case of *Evans v. Junior Order United American Mechanics*, 183 N. C. 358; 111 S. E. 526, which presents a suit by Daisy Evans, as beneficiary of H. N. Evans, a member of the Junior Order, to recover upon an insurance benefit policy of the defendant. The defendant sought to prove statements of H. N. Evans, the insured, made sometime subsequent to the enrollment of his name in the funeral department of the company. The Court held evidence of such statements inadmissible against

his beneficiary. At page 529 of the S. E. Reporter, the Court says:

> "In *Taylor v. Grand Lodge* (1907) 101 Minn. 72; 111 N. W. 919; 11 L. R. A. (N. S.) 92; 118 Am. St. Rep. 606; 11 Ann. Cas. 260, the whole subject is discussed in a very elaborate note, and, while there is some conflict on this point, evidently the weight of the reasoning and of authority is that the same rule applies as in ordinary life insurance policies, and that admissions of the insured, especially when made after the date of the policy, are not competent evidence against the beneficiaries therein. We think his Honor correctly followed the better reason in excluding the testimony offered of admissions by the insured made subsequent to the issuance of the benefit policy."
>
> • • •
>
> "Certainly this is almost the unbroken line of decisions as to ordinary life insurance, and we think, as already stated, that, while the authorities are divided in this respect as to the admissibility of evidence of this kind in actions on benefit policies, the reason of the thing does not justify any difference as to the admissibility of evidence in the latter case."

In *Wigmore On Evidence*, Vol. 2, Sec. 1081, the following appears to be the law:

> "In a beneficiary's action for the sum conditioned in a policy of life insurance, there is no legal identity of title between the deceased and the beneficiary, although the beneficiary's right is after all no more than the creation of the insured's contract; hence, unless the beneficiary has in the beginning been made a party to the contract so as to bind himself to be identified with the insured (and some forms of contract attempt this), the insured's admissions would not be receivable against the beneficiary."

In *Jones On Evidence*, Section 242, it is said:

"It is generally held that there is no such privity of interest between an insured person and his beneficiary as to admit the declarations of the former in actions on life insurance policies."

CONCLUSION

Not only is the decision of the Circuit Court of Appeals for the Fourth Circuit in direct conflict with the rules and decisions of the Supreme Court of South Carolina, but it is also in direct conflict with the decisions of the United States Supreme Court. Both Courts have held that in the construction of an insurance contract, it must be remembered that the Court should not ignore the fact that the primary object of all insurance is to insure and that in cases of doubt, uncertainty, manifest ambiguity or susceptibility of two equally reasonable interpretations, such contract must be liberally construed in favor of the insured. Insurance policies are drawn by legal advisers of insurance companies who study with care the decisions of the courts, and with such decisions in mind attempt to limit as nearly as possible the scope of the insurance. It is only a fair rule, therefore, which the courts have adopted to resolve any doubt or ambiguity in favor of the insured and against the insurance company. *Aschenbrenner v. United States Fidelity & Guaranty Co., supra.* If the defendant in this case really intended to exempt itself from all liability for death resulting from operating or riding in an airplane, it could easily have done so in plain, certain and unambiguous language. The fact that it has seen fit to create confusion, ambiguity and uncertainty by the use of a rubber stamp and language which refers only to persons in the military, naval and air forces is no fault of the insured. The Court cannot escape the conclusion that the real intent and purpose of the WAR

CLAUSE agreement attached to this policy was to exempt the insurance company from liability occasioned by the extra hazards of war and that the provision in the WAR CLAUSE limiting liability for death resulting from operating or riding in an airplane referred only to those persons engaged in warfare, to-wit: those serving in the military, naval and air forces of the country as defined in the WAR CLAUSE agreement itself.

Respectfully submitted,

C. Granville Wyche,
Alfred F. Burgess,
Attorneys for Petitioners.

FILE COPY

Supreme Court of The United States

OCTOBER TERM, 1947

No. 798-800

MARGARET ELLIS ANDERSON, *Petitioner,*

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

No.

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA, *Petitioner,*

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

No.

COCA-COLA BOTTLING COMPANY OF GREENVILLE, SOUTH CAROLINA, *Petitioner,*

vs.

PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY

BRIEF CONTRA PETITION FOR WRIT OF CERTIORARI

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II

THE OPINIONS OF THE DISTRICT COURT AND OF THE CIRCUIT COURT OF APPEALS

The opinion of the District Court was filed February 13, 1947, but it has not been reported (see, however, R. 27-35).

The opinion of the Circuit Court of Appeals was filed March 8, 1948, and is reported in 166 F. (2d) 492.

III

GROUNDS UPON WHICH THE PETITIONERS SEEK TO INVOKE THE JURISDICTION OF THE SUPREME COURT

The petition for a writ of certiorari is founded upon Section 5-b of Rule 38 of the Supreme Court and the assertion of conflict between the decision of the Circuit Court of Appeals for the Fourth Circuit and the laws of the State of South Carolina.

IV

STATEMENT

In these three actions the Petitioners seek to recover the face amount of three policies of insurance issued on the life of Waddy M. Anderson. In each case the Respondent contended death resulted from an excluded risk and that its liability under the policy was limited to a return of premiums paid.

The insured died of injuries sustained in an airplane accident while piloting his own private plane on a trip for his personal business or pleasure. (R. 36, 44).

On the first page of each policy there was a rubber stamp notice reading, "War and Aviation Clause Attached". Attached to and made a part of each policy was a page captioned, "War Clause", the language of which appears in full in the opinion of the Circuit Court of Appeals (R. 75-76) and which, among other things, provides:

> "If the death of the insured shall occur:
>
> * * * * * * *
>
> "3. As a result of operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regularly scheduled flight between definitely established airports within the continental limits of the United States * * * then, provided this policy is in force, the amount

payable shall be the total amount of the premiums paid without interest * * * *."

At the trial of the case, the Respondent offered certain parol evidence, outlined in the opinion of the Circuit Court of Appeals (R. 81), in support of what it contended to be the plain meaning of the policy. (R. 50, 54, 55). The evidence concerned admissions of the insured and negotiations between the Respondent and the insured, dealing for himself and for the corporate Petitioner. (R. 42, 48-49, 56). The evidence was offered on the theory (1) that evidence of the course of dealing of, and admissions by, the corporate Petitioner were admissible against it in the actions to which it was a party, (2) that such admissions and evidence of the course of dealing of the insured were admissible against the individual Petitioner in the action to which she is a party, she being the privy of the insured, and (3) that the parol evidence rule only bars attempts to *vary* the plain meaning of a written instrument, but does not bar parol evidence in *support* of a plain meaning of a written instrument. (R. 50, 54, 55; and see the appendix to this Brief, pp 11-25, in which appears excerpts from the brief of this Respondent filed in the Circuit Court of Appeals.)

The District Court excluded the proffered evidence and thereafter filed Findings of Fact and Conclusions of Law and an Opinion in each case favorable to the Petitioners. The Circuit Court of Appeals reversed the judgments of the District Court holding that the provisions of the policy were clear and unambiguous and that the cause of death was a limited risk, the Respondent's liability being limited to a return of premiums paid. The Circuit Court of Appeals found it unnecessary to pass upon the questions of admissibility of evidence.

V

ARGUMENT

There is no conflict between the decision of the Circuit Court of Appeals in these cases and the laws of the State of South Carolina. The petition for a writ of certiorari is founded solely upon asserted conflict with the laws of the State of South Carolina, but there is no reference to any conflicting statute or decision. On the contrary, the Circuit Court of Appeals carefully followed and relied upon the applicable decisions of the Supreme Court of South Carolina.

While the petition for a writ of certiorari contains six "Specifications of Error", the only laws of the State of South Carolina to which the Petitioners refer are decisions of the Supreme Court of that State holding:

(A) that "other things being equal", when language in an insurance policy is susceptible to "two equally reasonable interpretations", that favorable to the insured will be adopted *(Walker v. Commercial Casualty Co.,* 191 S. C., 187, 194; 4 S. E. (2d) 248, 250-251 (1939); *Haselden v. Standard Mutual Life Ass'n.,* 190 S. C. 1, 5; 1 S. E. (2d) 924, 926 (1939); *Bolt v. Life & Casualty Ins. Co.,* 156 S. C. 117, 152 S. E. 766 (1930)),

(B) that a clause limiting liability if the death results while the insured is in military service in time of war has no application unless there is some causal relation between the death and the "excluded condition" *(Young v. Life & Casualty Insurance Co.,* 204 S. C. 386, 29 S. E. (2d) 482 (1943)),

(C) that an incontestable clause in the ordinary language bars a defense of fraud in the application in accordance with its unambiguous terms, notwithstanding general public policy favoring the suppression of fraud *(McKendree v. Southern Life Ins. Co.,* 112 S. C. 335; 99 S. E. 806 (1918)),

(D) that declarations of an insured were not admissible against the beneficiary of (old) insurance policies (no privity being shown to exist between the insured and the beneficiary) *(Dial v. Life Association,* 29 S. C. 560; 8 S. E. 26 (1888); *Thompson v. Insurance Company,* 63 S. C. 290; 41 S. E. 464 (1901)).

The decisions referred to by the Petitioners appear to have little bearing upon the question presented by the petition, but insofar as they are apposite they are entirely in harmony with the decision of the Circuit Court of Appeals.

A

The cases cited by the Petitioners which hold that "other things being equal", when language in an insurance policy is susceptible to "two equally reasonable interpretations" that interpretation more favorable to the insured should be adopted are entirely consistent with the opinion of the Circuit Court of Appeals. Indeed the Circuit Court of Appeals not only considered the rather rudimentary proposition of those cases, but appropriately cited the *Walker* and *Haselden* cases in support of its decision (R. 77). Certainly the Circuit Court of Appeals did not overlook those decisions and so far from being in conflict with the decision of the Circuit Court of Appeals, they actually support it.

The so-called doctrine of strict construction of insurance contracts is not peculiar to the law of South Carolina, nor can there be found any extraordinary applications of the doctrine in the recent decisions of the Supreme Court of that State. For recent expressions of the doctrine by that Court, see in addition to the *Haselden* and *Walker* cases, *supra, S. S. Newell & Co. v. American Mutual Liability Co.,* 199 S. C. 325, 332; 19 S. E. (2d) 463, 466 (1942); *Brown v. Mutual Life Ins. Co. of N. Y.,* 186 S. C. 245, 252-253; 195 S. E. 552, 555 (1938); *Kittles v. General American*

Life Ins. Co., 182 S. C. 162, 174, 188 S. E. 784, 789 (1936); *Bolen v. Capital Life & Health Ins. Co.*, 208 S. C. 345, 348, 38 S. E. (2d) 79, 80 (1946).

As stated by the Supreme Court of South Carolina, in *S. S. Newell & Co. vs. American Mutual Liability Co., supra:*

> "The rule of strict construction against the insurer does not apply where the language used in the policy is so plain and unambiguous as to leave no room for construction. * * * * Nor does the rule of strict construction authorize a perversion of language or the exercise of inventive powers for the purpose of creating an ambiguity where none exists.
>
> "The judicial function of a Court of law is to enforce an insurance contract as made by the parties, and not to re-write or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous. It is not the province of the Courts to construe contracts broader than the parties have elected to make them, or to award benefits where none was intended. * * * *"

The Circuit Court of Appeals recognizes the doctrine of strict construction of contracts, but it concluded that the applicable provision of these policies was "so clear and unambiguous that we are forced to conclude that the lower Court erred in reading an ambiguity into the policy" (R. 77). The language being "clear and unambiguous", and there is nothing in the decisions of the Supreme Court of South Carolina to suggest a different conclusion, the doctrine of strict construction of ambiguities in insurance contracts after applying all other aids to construction, has no bearing upon this case and lends no support to the petition for certiorari.

B

Equally inapplicable to this case, is the case cited by the Petitioners which holds that a clause limiting liability

if the death of the insured results while in military service in time of war is inapplicable unless there is some causal relation between the death and the "excluded condition".

The "excluded condition", or the condition limiting liability, in this case is "death • • • • as a result of operating or riding in any kind of aircraft, except as a fare-paying passenger • • • •". The insured died in an airplane accident while piloting his own private plane. The causal connection between the death and the "excluded condition" which is "clear and unambiguous" is direct and proximate. Indeed such causal connection is an element of the limiting condition. The case to which the Petitioners refer in which there was no causal relation between the death and the excluded condition is wholly irrelevant to this case.

C

The reasoning of the Petitioners in citing the case of *McKendree v. Southern Life Ins. Co.*, 112 S. C. 335, 99 S. E. 806 (1919) escapes the Respondent. In that case the insurer sought to contest the validity of the policy on the ground of fraud of the insured in the application. The insurer sought to avoid the effect of an unambiguous incontestable clause, the literal terms of which barred the defense, with the argument that public policy favoring the exposure of fraud required a judicial limitation of the incontestable clause to permit the insurer to raise the question of fraud at any time. The Court refused to allow the insurer to thus avoid the effect of its unambiguous contract. Substantially the same contention had been presented to other Courts and similar conclusions reached. See, for instance, *Mass. Benefit Life Ass'n. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261 (1898).

In this case, the Respondent is not contesting the validity of the policy. On the contrary it stands upon the contract and the provision therein limiting its liability in

the event death results from operating or riding in aircraft. As stated by Mr. Justice Cardozo when Chief Judge of the New York Court of Appeals, "It (the incontestable clause) means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken". *Metropolitan Life Ins. Co. v. Conway*, 252 N. Y. 449, 452, 169 N. E. 642, 643.

And the Supreme Court of South Carolina has said, "We are of the opinion that the 'incontestable clause' relates to the validity of the contract of insurance. It does not affect the construction of the terms of the contract. There was no question here as to the validity of the policy. • • • •" *Livingston v. Mutual Benefit Life Ins. Co.*, 173 S. C. 87, 91, 174 S. E. 900, 901 (1934).

That the incontestable clause is totally irrelevant to a determination of policy coverage seems now to be universally held, and nothing can be found in the decisions of the Supreme Court of South Carolina to cast the least doubt upon the matter. See, for instance, the decision of the United States District Court for the Eastern District of South Carolina in *Wright v. Philadelphia Life Ins. Co.*, 25 F. (2d) 514.

D

It seems hardly necessary to point out the irrelevancy of the Petitioners' citations which hold that in actions on (old style) life insurance policies, declarations of the insured are inadmissible against the beneficiary. The Circuit Court of Appeals found it unnecessary to pass upon this Respondent's exceptions to the exclusion of evidence proffered by it. The failure of the Circuit Court of Appeals to pass upon this Respondent's exceptions to the exclusion of its proffered evidence certainly could not aggrieve the Petitioners, and could not be in conflict with the decision of any court considering the question.

If the admissibility of such evidence was before this Court, the Respondent would earnestly urge that admissions, and evidence of negotiations, of the chief executive officer and authorized agent of the corporate beneficiary and of persons in privity with the individual beneficiary are admissible against the beneficiaries. But notwithstanding the Petitioners' "Specification of Error", that matter could hardly form the basis for allowance or disallowance of a writ of certiorari when it was not involved in the decision of the Circuit Court of Appeals.

CONCLUSION

The "Specifications of Error" and the brief of the Petitioners contain a great deal of argumentative matter unrelated to any law or decision of the State of South Carolina. Much of such matter is wholly unsupported by anything in the record, but it appears unnecessary to further burden this Court with discussion of other matter which is immaterial to the question presented by the petition for certiorari. The appendix to this brief contains certain excerpts from the brief of the Respondent in the Circuit Court of Appeals from which, in answer to some of the assertions of the Petitioners, those members of the Court who may be interested may see the contentions of this Respondent in the Circuit Court of Appeals which were exactly the same as those advanced by it in the District Court.

The petition for certiorari is founded upon asserted conflict between the decision of the Circuit Court of Appeals and decisions of the Supreme Court of South Carolina under Section 5-b of Rule 38 of this Court. The only decisions of the Supreme Court of South Carolina referred to by the Petitioners are those mentioned and analyzed above. None of them are in the least in conflict with the decision of the Circuit Court of Appeals. All of them stand for propositions which are generally accepted and

which the Circuit Court of Appeals would presumptively apply if the occasion arose. But most of them are wholly irrelevant to the question determined by the Circuit Court of Appeals and those which have some relevance are thoroughly consistent with, and actually support, the decision of the Circuit Court of Appeals.

The Supreme Court of South Carolina has not been called upon to construe a clause precisely like that involved in these cases. Its decisions upon a number of the considerations involved in a determination of the ultimate question presented in these cases, however, point the way to the conclusion reached by the Circuit Court of Appeals. They indicate that the Supreme Court of South Carolina would have reached exactly the same conclusion reached by the Circuit Court of Appeals had the precise question been presented to it. The Circuit Court of Appeals cited and relied upon a number of South Carolina decisions on the legal principles involved and those decisions abundantly support the propositions for which they are cited.

The Petitioners having failed to point to any law or decision of South Carolina which conflicts with the decision of the Circuit Court of Appeals (for the very good reason that there are none), it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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APPENDIX

Reproduced in this appendix are portions of the brief of this Respondent in the Circuit Court of Appeals from which, in view of certain statements in the brief of the Petitioners, any interested member of the Court may see the position of this Respondent in the Courts below.

* * * * * * * * * * *

I

EVIDENCE OF NEGOTIATIONS FOR AN AMENDMENT OF THAT CLAUSE IN THE CONTRACT WHICH THE DISTRICT COURT WAS ASKED TO CONSTRUE, AND WHICH SHOWS THE CONSTRUCTION PLACED UPON THE CLAUSE BY THE PARTIES TO THE CONTRACT, SHOULD HAVE BEEN RECEIVED, IT BEING COMPETENT AND PERTINENT TO A PROPER CONSTRUCTION OF THE CONTRACT.

The appellant offered to prove at the trial that the parties to the insurance contract had shown their mutual interpretation of the clause, the meaning of which is now in issue, by conduct arising out of negotiations for an amendment of that clause.

As to each of the three policies, Waddy M. Anderson, the insured, had full authority to deal with the appellant with respect to them. Of that payable initially to his wife, he was the owner, with right to change the beneficiary who herself had no vested interest in the policy. As to the two policies payable to, and owned by, Coca-Cola Bottling Company of Greenville, South Carolina, Mr. Anderson was the executive head of that company and it was he who handled all the transactions of the company with respect to those policies.

The appellant offered to prove that Mr. Anderson, after he began to fly private planes, sought to effect an amendment of all three policies so as to provide full cover-

age should he die of injuries sustained while flying his private plane; that he considered the additional premium asked by the appellant to effect such an amendment of the policies, but advised the appellant that he had determined to wait until such amendments could be effected for smaller additional premiums; that in those negotiations he agreed and admitted without such amendments the appellant would not be liable for the face of the policy should the insured die of injuries received while engaged in piloting his own plane.

Those negotiations constitute evidence of a mutual interpretation of the policy by the appellant and by Mr. Anderson, acting for everyone who had a vested interest in the policies.

Such mutual interpretations of a contract before dispute arises and while the parties are in harmony, have long been recognized by the Courts as one of the most helpful and useful aids to interpretation. Indeed, it has frequently been said that such interpretation by the parties is entitled to "great, if not controlling, influence". See, for instance, 12 *American Jurisprudence* 787, 788.

As stated in 2 *Federal Law of Contracts,* page 92, *et seq.:* (Quotation omitted) * * *.

The applicability of the principle to the interpretation of insurance contracts has been repeatedly stated.

Almost the exact situation here presented was passed upon by the Eighth Circuit Court of Appeals in the case of *Sulzbacher vs. Travelers Insurance Co.,* 137 Fed. (2d) 386 (C. C. A., 8th, 1943). In that case the insured died in an airplane accident. Previously, he had obtained an amendment of the policy, paying an additional premium therefor, which extended coverage to injury or death occurring while the insured was a fare-paying passenger, etc., in an airplane. The beneficiary contended that what purported to be an aircraft exclusion clause in the original policy was ineffective because in conflict with other policy provisions

and because of other asserted ambiguities. The beneficiary, therefore, took the position that the policy should be construed as applying to the particular accident in which the insured died though not within the terms of the rider added by the amendment. The Court through Judge Riddick said at page 391:

> "Moreover, if ambiguity may possibly be found in the policy under consideration, it appears that, long before the accident which gives rise to this suit occurred, the parties by their conduct had construed the policy against the contentions now advanced. No better mode of ascertaining the proper construction of a contract can be found than that afforded by the actions of the parties under it. (Citing cases.) It is impossible to believe that the insured or insurer interpreted the policy as originally written to cover the result of injuries received by insured while traveling in an airplane in view of the conduct of the parties in amending the policy to include such a coverage. If the insured had construed the policy as originally written to protect him against the hazards of aerial navigation, he certainly would not have found it necessary to amend the policy to provide that coverage; nor to pay an additional premium to secure a coverage less than that appellant now claims was always his under the original policy."

In this case the policy amendment was never consummated because the insured felt the risk did not justify the cost, but the negotiations for the amendment are equally revealing as to the intentions of the parties as they would have been had the amendments been effected. There is no difference in principle between this and the *Sulzbacher* case.

The parol evidence rule has no applicability here. The appellant by its offer of proof was not seeking to vary the plain meaning of the words of the instrument, but to sup-

port what it contended was the plain unambiguous meaning of the words of the policy. The appellee contended below that some ambiguity could be found in the policy, and the District Court supported that view. A marked inconsistency then results from a ruling that extrinsic evidence is inadmissible because the policy is unambiguous and a holding on the merits that the policy is ambiguous and should be construed against the insurer.

It is uniformly held that extrinsic evidence is admissible as an aid to the interpretation of ambiguous provisions of a contract, or in support of provisions of a contract asserted to be ambiguous. The only limitation of the parol evidence rule in this type of situation is that the extrinsic evidence be not in conflict with unambiguous provisions of the written instrument. The parol evidence rule prohibits an attempt to *vary*, by parol evidence, the plain meaning of a written instrument; it does not prohibit an attempt to *support*, by parol or extrinsic evidence, a reasonable interpretation of the language of a written instrument.

Such extrinsic evidence is held to be admissible in South Carolina. (Citing cases.)

* * * * *

While it is true and appropriate that ambiguous provisions of insurance policies are to be construed against the insurer, that principle has no application unless there is ambiguity after consideration of the policy provisions in the light of other accepted principles of construction of written instruments. As Judge Stone, speaking for the Circuit Court of Appeals for the Eighth Circuit, said in *Gulf Refining Co. vs. Home Indemnity Co.*, 78 Fed. (2d) 842, 843-844 (C. C. A. 8th, 1935):

> "* * * The sole purpose of all contract construction is to ascertain the intention of the parties to the contract. The rule that insurance contracts are to be construed against the insurer

> is purely a rule of construction which comes into play as an aid to construction only when, after using all other effort to ascertain the intention of the parties, the contract is yet ambiguous as to which of two things was intended—one favorable to the insurer and the other to the insured. It is not at all a rule to be used in *seeking* a meaning favorable to the insured. It is the last straw moving the scale which has been left uncertain by an ambiguity."

The rule of strict construction against an insurer in South Carolina is no more than that. It is only that "*other things being equal,* that construction should be adopted which is most beneficial to the insured" (emphasis added). *Haselden vs. Standard Mutual Life Ass'n.,* 190 S. C. 1, 5, 1 S. E. (2d) 924, 926 (1939). The strict construction rule comes into play only where, after exhausting all other aids to interpretation, the policy is "susceptible of two equally reasonable interpretations". *Walker vs. Commercial Casualty Ins. Co.,* 191 S. C. 187, 194, 4 S. E. (2d) 248, 250-251 (1939). See also *S. S. Newell & Co. vs. American Mutual Liability Ins. Co.,* 199 S. C. 325, 332, 19 S. E. (2d) 463, 466 (1942); *Brown vs. Mutual Life Ins. Co. of N. Y.,* 186 S. C. 245, 252-253, 195 S. E. 552, 555 (1938); and *Kittles vs. General American Life Ins. Co.,* 182 S. C. 162, 174, 188 S. E. 784, 789 (1936).

The principle of strict construction against an insurer when an ambiguity remains after applying other accepted principles of construction, does not mean that the courts should ignore accepted principles of construction by which ambiguities, superficially apparent, may be dissipated. Nor does it mean that the insurer is to be denied the privilege of establishing, by competent evidence, the basis for the application of accepted principles of contract construction which would aid in the dissipation of an ambiguity which might otherwise be superficially apparent.

The Federal District Court, sitting in South Carolina, should have followed the established law of that State as to the admissibility of such evidence, for by excluding the evidence the District Court denied to the appellant the benefit of principles of construction which the State courts are required to apply. *Bolt vs. Life & Casualty Ins. Co. of Tennessee, supra.* The District Court reached a result in conflict with that which would have followed an application of the principles of construction prevailing in the State courts. In so doing, it committed reversible error. * * * *

The appellant offered to prove admissions and declarations by Waddy M. Anderson, as to the clause in issue, made to the general agent of the appellant at the time of the application for the policy, at the time of its delivery and subsequently and similar admissions and declarations against interest made by Mr. Anderson to others having no connection with the appellant.

In general, evidence of admissions of a party are admissible against that party. The admissions of fact of Waddy M. Anderson, the executive head of the Coca-Cola Bottling Company of Greenville, South Carolina, while dealing for that corporation with respect to the policies it owned, are properly chargeable to the corporate principal and admissible against it.

See 20 *American Jurisprudence* 511, *et seq.*

As to the case brought by the widow on the policy of which she was the named beneficiary, the declarations against interest of the insured who had reserved the right to change the beneficiary, the insured having applied for the policy, stand upon the same basis. Mrs. Anderson had no vested right in the policy prior to the death of the insured, and his declarations against interest are equally admissible as the admissions of the corporate plaintiff in the other two cases.

Insofar as the proffered admissions and declarations

may have involved conclusions of law, they were none the less admissible as supporting the appellant's proffered evidence of conduct of the parties constituting mutual interpretations of the contracts. If evidence of that conduct is admissible, the appellant should have the further right to show by declarations against interest that Mr. Anderson's conduct of the negotiations was considered and deliberate and based upon full and complete information and perfect understanding of the situation.

An admission in the form of a conclusion is frequently admissible to show the knowledge of the declarant. In this case the respondents in the Court below took the position that the arrangement of the policy and the caption of the clauses limiting liability created ambiguity and confusion. The District Court in its opinion uses the words "mislead the insured" and "misleading". Certainly the proffered admissions would tend to negative any such position and would tend to show that, so far from being misled, this insured was fully informed at the time he applied for the policies and at all times thereafter.

The Court in *Continental Casualty Company vs. Goodnature*, 41 Pac. (2d) 77, 79-80, (Okla. 1935) stated:

> "It, therefore, appears that there was no disagreement between the parties at the time the policy was written as to what was covered by it. In *U. S. Fidelity & Guaranty Co. v. Town of Comanche*, 114 Okl. 237, 246 P. 238, this court held that if the intention of the parties is not clearly ascertainable from the instrument itself, the circumstances under which the contract was made should be taken into consideration and the contract should be so interpreted as to give effect to the mutual intention of the parties."

This appellant, it is submitted, should have been permitted to show by direct evidence that, far from misleading the insured, the insured was fully informed, that the in-

sured fully understood and that there existed perfect mutuality of agreement and intention between Mr. Anderson and the appellant. The appellant, it is submitted, should have been permitted to show by direct and competent evidence that Mr. Anderson, with full information, accepted and voluntarily chose to keep without amendment, which was available to him for an extra premium, a policy which both parties understood and intended to contain a limitation of liability in the event of death from injuries sustained while flying his own private plane.

EVEN WITHOUT EXTRINSIC EVIDENCE OF INTENTION, THE POLICY SHOULD HAVE BEEN HELD TO LIMIT THE LIABILITY OF THE INSURER IN THE EVENT OF THE DEATH OF THE INSURED WHILE FLYING HIS OWN PRIVATE PLANE.

Each of the three policies contained a provision as follows:

> "If the death of the Insured shall occur:
> "* * * * *
> "3. as a result of operating or riding in any kind of aircraft, except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regularly scheduled flight between definitely established airports within the continental limits of the United States;
> "* * * * *
> "then, provided this policy is in force, the amount payable shall be the total amount of the premiums paid without interest or the life insurance reserve, which ever is greater, * * * *."

The language of the policy, as quoted above, could hardly have been made clearer or less ambiguous. Its applicability to the death of the insured while flying his own private plane appears obvious. Nor can the force of the words be avoided merely because they were incorporated in a clause which also contained limitations of liability in

the event of death from specified war risks, the entire clause being captioned "War Clause", when the policy bore on its face a notation, "War and Aviation Clause Attached".

In the present stage of the development of aviation, participation in aviation, except as a fare-paying passenger on commercial airlines, is generally recognized as an extra-hazardous insurance risk. Clauses which confine the coverage so as to exclude extra-hazardous aviation risks have been upheld as valid in many cases. And this Court may take judicial notice of the general practice of insurance companies of removing such clauses upon, but only upon, the payment of an extra premium designed to cover the extra hazard assumed.

It is quite natural to incorporate all limitations of liability in one clause or section of an insurance policy. Unless each insured is fully informed of them, a scattering of such limitations through an insurance policy would be more likely to result in an insured overlooking one or more of them, than a concentration of all in one clause or section. Particularly is that true where by notation on the face of the policy, the attention of the insured is called to the presence of such limitations.

Accordingly, limitations of liability as to war risks and aviation risks are frequently coupled in the same clause, and the courts in construing such clauses have interpreted each type of limitation separately and unburdened by the other notwithstanding their incorporation in the same clause or sentence. (Citing cases.)

The caption of the clause here at issue may not be fully descriptive of all the matter contained therein. But, necessarily, a caption, being brief, cannot impart the full and exact meaning of detailed provisions which follow it. It is designed to center attention and to facilitate the finding of particular provisions of the policy. Perhaps other

words would have served that purpose more appropriately, but those used cannot be said to be misleading or in conflict with the detailed provisions of the clause.

And the Court cannot ignore the fact that on the face of each policy appear, in contrast to the printed matter, the stamped words "War and Aviation Clause Attached", and the words are stamped again at the end of the incontestable clause. These stamped words refer to a clause, not to clauses, and the only clause to which they could possibly refer is that bearing the caption in plain black letters, "War Clause". Attention was thus invited to the presence of aviation limitation provisions attached to the policies, and those provisions are in fact found in the only clause to which the notation could possibly have reference.

There have been cases involving insurance contracts where the policy held out to the insured broad promises in large bold type and subsequently sought to materially restrict those promises by inconspicuously typed provisions in other parts of the policy. Thus in *Graham vs. Business Men's Assur. Co. of America,* 43 Fed. (2d) 673 (C. C. A. 10th, 1930), in *Hessler vs. Federal Casualty Co.,* 129 N. E. 325 (Ind. 1921), and in *Walker vs. Commercial Casualty Ins. Co.,* 191 S. C. 187, 4 S. E. (2d) 248 (1939) where there were boldly displayed, by rubber stamp or type, affirmative, promissory undertakings wholly or partially in conflict with other inconspicuous provisions of the policy, ambiguity was properly held to result to the extent of the conflict.

There is no such conflict here, however. The most that can be said is that the caption of the limiting clauses is not fully descriptive of all the matter in them. Under these circumstances, the statement of the Court in *Continental Casualty Co. vs. Trenner,* 35 Fed. Supp. 643, 644, (E. D. Pa. 1939) is pertinent:

> "As long as insurance policies are contracts and not merely the assuming of legal relations

prescribed by policy or statute, we can hardly go to the extent of requiring them to be drawn so that people who read nothing but the titles of the clauses will be completely informed of everything that is in the policy."

See also *McPherrin vs. Hartford Fire Insurance Co., et al.*, 44 Fed. Supp. 674 (N. D. Calif. 1942).

Indeed, in South Carolina, the insured and the owners of the policies are conclusively presumed to have read them—all of the detailed provisions of them. *Dukes vs. Life Ins. Co. of Virginia*, 184 S. C. 500, 193 S. E. 36 (1937); *Able vs. Equitable Life Assur. Soc.*, 186 S. C. 381, 195 S. E. 652 (1938). They had possession of the policies for more than three years prior to the death of the insured and are conclusively presumed to have read their terms. Apart from consideration of the direct testimony proffered by the appellant, the appellees, under the law of South Carolina, cannot be heard to say that the insured and the owners of the policies had not read, and become fully informed of, that provision of the policy now involved in this controversy. Being conclusively presumed to have read the detailed provisions, the fact that a caption may not have been fully descriptive of them is entirely immaterial.

While the printed caption of the exclusion clause may not have been wholly descriptive of all the provisions contained in it, the notation on the face of the policy, "War and Aviation Clause Attached" was certainly some indication to anyone looking over the policy that some provisions regarding aviation were to be found in the clause denominated "War Clause", to which alone the notation could refer. The province of a caption can be no more than to facilitate reference and to indicate broadly what follows. The notation on the face of the policy coupled with the caption of the clause denominated "War Clause" does facilitate reference to the aviation risk limitations and in-

dicate their presence. No more should be expected of captions.

The stamped notation *"War and Aviation Clause Attached"* on the first page of the policy was a part of the policy. (Citing cases.) Indeed, because of its prominence and the obvious indication from the use of a rubber stamped provision or notation that it is intended to modify or emphasize provisions of a previously prepared, printed form, a rubber stamped notation on a printed contract is entitled to particular consideration by the parties and the courts.

The printed words "War Clause" at the top of the exclusion clause must therefore be regarded as modified by the stamped words on the first page of the policy, "War and Aviation Clause Attached", for the stamped words cannot conceivably refer to anything in the policy other than the clause denominated, "War Clause". Construed together, the stamped words on the face of the policy and the printed caption on the exclusion clause are fully descriptive of both the war and aviation limitations contained in the active provisions of the clause. Even if, under the laws of South Carolina, the insured was not bound to read the active provisions of the clause, the stamped words were fully sufficient to put a reasonable person upon inquiry as to the presence of aviation limitations, and, being on inquiry there is little room for any legalistic criticism by the appellees of the printed caption of the exclusion clause.

The provisions of the clause itself seem abundantly clear. By indentation and separate numbering of clauses each type of limitation is separately referable to the limiting words. The clause opens with the words, "If the death of the insured shall occur:" and following the colon are four separately numbered and indented clauses following which are the unindented words "then, provided the policy is in force, the amount payable shall be the total amount of

the premiums paid without interest or the life insurance reserve, whichever is greater * * * *". (See Appendix P. 33). Such separate numbering and indentation is frequently employed in the drafting of statutes and all types of contracts to achieve separate and independent referability of the indented, numbered clauses to the actionable words which precede and follow them. It is a well known device that avoids unnecessary and tedious repetition of words, but has never been thought, in the avoidance of repetition, to create confusion. It is a device which saves space and words and, at the same time, lends itself to clarity. So far as the appellant has been able to find, it has never been held, of itself, to create, or contribute to, ambiguity. The applicability of the aviation limitation provision should thus be considered as if it alone and without alternative was the predicate of the verb "shall occur".

It is interesting that in the other three indented alternative predicates of the verb "shall occur", specific reference is made to the status of the insured as to military service. Predicate number 1 applies only if the insured is "in the military, naval or air forces of any country engaged in war". Predicate number 2 applies only when the insured is serving "in the air force of any country engaged in war". Predicate number 4 applies only when the insured is a "civilian". Predicate number 3, the aviation exclusion provision, alone does not specifically restrict its application in terms of the insured's status with reference to military service. When three of the four alternative predicates are thus carefully restricted to instances in which the insured is or is not a member of certain military forces, this Court is not justified in reading into the other predicate a restriction which the parties themselves did not by appropriate words incorporate therein. And if the Court was inclined to read into the aviation exclusion clause words which are not to be found in it, it seems impossible

to determine which set of words used varyingly in the other three alternative predicates should be adopted.

It is not the policy of courts to construe a provision of an insurance policy as being meaningless unless it is in clear conflict with other policy provisions. If the clause here at issue has any meaning at all, and the parties obviously intended that it have meaning, it can hardly be construed otherwise than in accordance with the clear import of the words used. Those words limit the liability of the insurer if death "shall occur * * * as a result of operating or riding in any kind of aircraft", with an exception here immaterial. Those words have been frequently construed by the courts and held to be clear and unambiguous. There seems to the appellant nothing in the context or arrangement of the words in these policies which would require or justify a different interpretation of those words in these cases.

There being no ambiguity in the actionable words of the policy, none can be created, under established rules of construction, by reference to an asserted ambiguity in the caption. If it were conceded by the appellant that the caption, considered in conjunction with the stamped words on the face of the policy but without reference to the actionable provisions of the policy, was somewhat ambiguous (as indeed any caption must be), it avails the appellees nothing. Reference to a caption may be had to explain an ambiguity if one exists in the actionable words, but resort may not be had to a caption for the purpose of creating an ambiguity which does not otherwise exist in the actionable words. (Citing and discussing cases) * * * *.

It is respectfully submitted, therefore, that the appellant, in support of the literal meaning of the words of the policy, should have been allowed to introduce evidence of negotiations between the parties showing their interpretation and understanding of the provisions at issue,

supported by other statements of the insured showing his knowledge and understanding, and that in any event the provisions of the policy should have been held to limit the liability of the insurer to the amount tendered to the plaintiffs, the insured having died while flying his own private plane.